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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Nondiscrimination in the Distribution of	)	CS Docket No. 01-7
Interactive Television Services Over Cable	)	
	)	
To: The Commission	)	

REPLY COMMENTS OF THE NATIONAL LEAGUE OF CITIES

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Dated: May 10, 2001

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REPLY COMMENTS OF THE NATIONAL LEAGUE OF CITIES

The National League of Cities ("NLC") submits these reply comments in response to the opening comments filed in response to the Notice of Inquiry ("*NOI*"), released January 18, 2001, in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

In these reply comments, NLC addresses only the part of the *NOI* (¶¶44-50) seeking comment on the proper legal classification of ITV services and the opening comments addressing that issue. We believe it is clear that ITV services are a "cable service" within the meaning of 47 U.S.C. §522(6) and are thus subject to Title VI of the Communications Act. Most commenters that addressed this issue appear to agree with that conclusion, and those that did not have simply misread the plain language of the Act,

as well as the unequivocal legislative history of the 1996 amendment to the "cable service" definition.

Indeed, the argument that ITV services are a "cable service" is even stronger than the argument that cable modem services are a "cable service", an argument that is itself quite strong. The reason is that ITV services necessarily involve not only subscriber interaction for selection or use of "other programming service" within the meaning of 47 U.S.C. §§ 522(6)(A)(ii) and 522(14), but also subscriber interaction for selection or use of "video programming" within the meaning of 47 U.S.C. §§522(6)(A)(i) and 522(20).

Because ITV services are a "cable service," they are subject to all of the provisions of Title VI that are applicable to other cable services. That, of course, includes cable franchise fee obligations under 47 U.S.C. §542. Title VI is a particularly appropriate vehicle for treatment of embryonic new services like ITV services, because it leaves such services subject only to a very light hand of regulation.

I. ITV SERVICES ARE A "CABLE SERVICE" WITHIN THE MEANING OF 47 U.S.C. §522(6).

Although many commenters did not address the legal classification issue, most of those that did agree that ITV services are a "cable service."[1] Moreover, several other

[1] *See* , *e.g.*, Charter Comments at 13; Comcast Comments at 14; NCTA Comments at 41-44.

commenters, while not directly addressing the legal classification issue, made arguments resting on the implicit assumption that ITV services are a "cable service."[2]

These commenters are clearly correct: ITV services are a "cable service" within the meaning of 47 U.S.C. §522(6).[3] Like cable modem services, ITV services unquestionably entail "subscriber interaction . . . required for the selection or use" of "other programming service" within the meaning of 47 U.S.C. §522(6)(A)(ii) and (B). Many of the arguments as to why that is true are set forth in the comments and reply comments of the City Coalition (of which the NLC is a member) that were filed in the Commission's pending *Cable Modem NOI* proceeding.[4] Rather than repeating those arguments here, we incorporate them by reference, attaching a copy of the City Coalition's opening comments in the *Cable Modem NOI*, filed December 1, 2000, as Exhibit A hereto, and a copy of the City Coalition's reply comments in the *Cable Modem NOI*, filed on January 10, 2001, as Exhibit B hereto.

In addition to those arguments, however, there is yet another argument, beyond those applicable to cable modem service, why ITV services are a "cable service." Unlike

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[2] *See, e.g.*, ALTV Comments at iii & 18 (relying on 47 U.S.C. §536, a Title VI provision); MSTV Comments at 8 (relying on FCC's Part 76 rules concerning cable television); Non-MVPD Owned Programming Networks Comments at 24-25 (relying on Title VI and pointing out that even the court decision in *Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000), supports treating ITV as a "cable service"); NAB Comments at 14 (relying on Title VI provisions).

[3] In his dissenting statement accompanying the *NOI*, Commissioner Furchtgott-Roth suggested as much, referring to 47 U.S.C. §544(f), a Title VI provision applicable only to "cable services." Dissenting Statement of Commissioner Harold Furchtgott-Roth, CS Docket No. 01-7, FCC 01-15, at 21 (released Jan. 18, 2001).

[4] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Dkt. No. 00-185, Notice of Inquiry, FCC 00-355 (rel. Sept. 28, 2000) ("*Cable Modem NOI*").

some current cable modem services, ITV services also by definition entail "subscriber interaction . . . required for the selection or use" of "video programming" within the meaning of 47 U.S.C. §522 (6)(A)(i) and (B). Indeed, the *NOI*'s proposed definition of ITV closely tracks this prong of the "cable service" definition: "ITV is a service that supports subscriber-initiated choices or actions that are related to one or more video programming streams." *NOI* at ¶6. Commenters confirm this conclusion when they claim, quite correctly, that the *sine qua non* of ITV services is video programming.[5]

In light of the obvious fit between the *NOI*'s definition of ITV services and the Act's "cable service" definition, it should not be surprising that few commenters dispute that ITV services are a "cable service." In fact, only one commenter, SBC/BellSouth, disputes this proposition, while another, Earthlink, seeks to piece-part ITV services into cable service and non-cable service categories. Both are wrong.

SBC/BellSouth asserts that ITV services are an "information service" and not a "cable service." As an initial matter, SBC/BellSouth overlooks that the terms "information service" and "cable service" are *not* mutually exclusive. [6] On the contrary, "cable service" can and should be viewed as a subspecies of "information service."[7]

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[5] *See, eg.*; OpenTV Comments at 19 (a "video stream provided simultaneously to a group of viewers or subscribers" is the "distinguishing feature separating ITV from other forms of two-way digital communications"); TiVo Comments at 2 ("certain attributes of ITV are well known and unlikely to change": "the data that enables many ITV services will be embedded in the video programming that is distributed to consumers over cable and satellite").

[6] Comcast Comments at 17.

[7] Exh. A, City Coalition Comments in *Cable Modem NOI* at 24-27.

Furthermore, SBC/BellSouth's argument (at 10-13) as to why it believes ITV services are not a "cable service" flies in the face of statutory language, the legislative history of the 1996 amendment to the "cable service" definition, and common sense.[8] SBC/BellSouth simply ignores that "video programming" is the *sine qua non* of ITV services,[9] and sidesteps the inherent interplay between, on the one hand, the "video programming" and "other programming service" components of the "cable service" definition in 47 U.S.C. §522(6)(A)(i) and (ii) and, on the other hand, the newly expanded upstream scope of the "cable service" definition created by the 1996 amendment to 47 U.S.C. §522(6)(B).[10] And SBC/BellSouth's suggestion (at 10) that the regulatory classification of ITV service should not "vary depending on whether the consumer receives video service over cable or DBS" proves far too much. Under SBC/BellSouth's twisted logic, even traditional cable satellite programming like ESPN and CNN would not be a "cable service" when delivered over a cable system because, after all, those programming services are also delivered to consumers over DBS.[11] In fact, of course, the Act does indeed draw "regulatory distinctions based purely on technology," whether SBC/BellSouth (at 10) likes it or not.

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[8] *Id.* at 5-12.

[9] *See* note 5 *supra* and accompanying text.

[10] *See* Exh. B, City Coalition Reply Comments in *Cable Modem NOI* at 13-14. Moreover, it is SBC/BellSouth, *not* cable service classification proponents, that seeks to have "the tail wag the dog" by conceding that ITV service involves "subscriber interaction" with video programming but nevertheless asserting that this fact somehow does not result in its classification as a cable service. *See* SBC/BellSouth Comments at 12.

[11] *See* Exh. B, City Coalition Reply Comments in *Cable Modem NOI* at 15-16.

Apparently sensing the untenability of an absolutist anti-"cable service" position such as SBC/BellSouth's, Earthlink takes a different tack. It seeks to subdivide ITV into two categories: (1) those ITV services involving "subscriber-initiated choices" that entail "choosing among options selected by a cable operator and broadcast to all subscribers," which Earthlink concedes are a Title VI "cable service"; and (2) those ITV services that involve "choosing among options that are 'customized' by individual subscribers through transmission of information of their own choosing," which Earthlink believes are a Title II "'telecommunications service' used to transmit [an] 'information service.'" Earthlink Comments at 2-5.

The line Earthlink tries to draw, however, is far too fine and would be completely untenable from a regulatory classification standpoint. First of all, like SBC/BellSouth's argument, Earthlink's position rests on the mistaken premise that "information service" and "cable service" are mutually exclusive.[12] As the text and legislative history of the 1996 amendment to 47 U.S.C. §522(6) make clear, "cable service" includes *all* subscriber interaction with or use of *all* "information services" provided over a cable system.[13]

Second, Earthlink's proposed dividing line -- between "the transmission or manipulation of information controlled by the user" and a user's "'selection or use of information controlled by the cable operator" (Earthlink Comments at 4) -- evaporates under scrutiny. As an initial matter, the language of 47 U.S.C. §522(6)(B) does not draw

[12] *See* notes 6-7 *supra* and accompanying text.

[13] Exh. A, City Coalition Comments in *Cable Modem NOI* at 6-10; Exh. B, City Coalition Reply Comments in *Cable Modem NOI* at 7-14.

the line Earthlink wants it to draw. "Cable service" includes "subscriber interaction, if any, which is required for the selection *or use* of" video programming or other programming services. By definition, "use" requires subscriber-generated input. Unless the subscriber communicates by telepathic thought waves, in order to "use" the pertinent video programming, the subscriber will have to generate, "transmit" and/or "manipulate" information, presumably of the subscriber's own "selection" or "choosing." With the 1996 addition of the broad term "use," Section 522(6)(B) simply cannot be read to exclude such subscriber-generated information and/or communications.

Moreover, the truly illusory nature of Earthlink's "subscriber-controlled content" versus "service provider-controlled content" distinction is laid bare by some of the examples it provides. In a very literal sense, the ITV service provider is almost invariably the ultimate controller of content, for its service decisions effectively place parameters on the subscriber's options and choices. "T-commerce," cited by Earthlink (at 2) as an example of supposedly subscriber-controlled content, proves the point. The subscriber presumably may purchase only those items that the service provider offers for sale, and often only at the price set by the service provider. That, of course, means that T-commerce ultimately involves service provider-controlled content. The same is true for "chat rooms" associated with video programming (the only sort of chat rooms that would seem to qualify as ITV services): The parameters of the chat room are effectively defined by the content of the video programming to which it is tied. Finally, Earthlink's proposed boundary (at 2) between "choosing among camera angles" (a "cable service") and "manipulating the video program in an unlimited, individualized fashion"

(supposedly not a "cable service") would not only prove difficult, if not impossible, for a regulator to discern in any given context; it also ignores that the parameters of permissible video program manipulation underlying a subscriber's "individualized" manipulation would in all likelihood be defined (or at a minimum circumscribed) by information embedded in the downstream content furnished by the service provider.

In sum, the record leaves no doubt that ITV services are a "cable service" subject to Title VI.

II. AS A "CABLE SERVICE," ITV SERVICES ARE SUBJECT TO THE PROVISIONS OF THE TITLE VI.

The *NOI* also asks (at ¶45) for comment on the implications of classifying ITV services as a "cable service." We believe those implications are rather clear and straightforward: The provisions of Title VI applicable to "cable service," including the franchise fee provision of 47 U.S.C. §542, should apply to ITV services.[14] We add that, contrary to the assertions of SBC/BellSouth (at 12), application of Title VI to ITV services would *not* "enmesh the Commission in excessive regulation of ITV service providers." To the contrary, Title VI gives the Commission relatively little jurisdiction over "cable services," *see* 47 U.S.C. §544(f), and embodies a decidedly light-handed

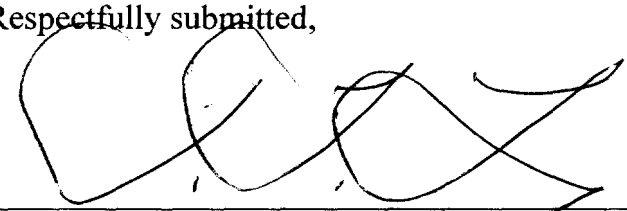
[14] *See* Exh. A, City Coalition Comments in *Cable Modem NOI* at 12-16.

approach to regulation.[15] Those Title VI requirements that would apply to ITV services are comfortably compatible with existing cable service regulation.[16]

CONCLUSION

For the foregoing reasons, the Commission should classify ITV services as a "cable service" subject to Title VI.

Respectfully submitted,



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Dated: May 10, 2001
WALIB 90239.1\107647-00008

[15] *Id.* at 15-16.

[16] *Id*; Exh. B, City Coalition Reply Comments in *Cable Modem NOI* at 15.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities	)	GEN Docket No. 00-185
	)	
	)	
To: The Commission	)	

COMMENTS OF THE NATIONAL LEAGUE OF CITIES, THE TEXAS COALITION OF CITIES FOR UTILITY ISSUES, THE CITY OF PALO ALTO, CALIFORNIA, AND THE CITY OF EUGENE, OREGON

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Dated: December 1, 2000

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SUMMARY

The City Coalition shares the *NOI's* goal of promoting the widespread and rapid deployment of high-speed services. We also applaud the FCC's objective of eliminating the inconsistency and ambiguity about the regulatory status of cable modem service created by recent court decisions. We are heartened by the *NOI's* recognition that the Communications Act accords different treatment to different kinds of providers and services, and that the Act therefore may not permit, much less require, the Commission to apply the same Titles of that Act to the offerings of all providers of high-speed Internet services. Any resulting differences in regulatory treatment among providers reflect boundaries drawn by Congress, and that only Congress can change.

1. **Regulatory Classification of Cable Modem Service.**

Cable modem service is a "cable service." 1996 Act's Conference Report, which is of course the most reliable legislative history, makes clear that the 1996 amendment to the "cable service" definition was intended to include both enhanced services and information services made available to subscribers by a cable operator. The 1996 expansion of the "cable service" definition represents a consistent application of Congress' original intent in the 1984 Cable Act that the "cable service" definition is intended to mark the boundary between those services provided over a cable system that would be exempt from common carrier regulation and all other communications services that could be provided over a cable system. Moreover, cable modem service easily fits within the broad definition of "other programming service," a definition whose plain language is sufficiently broad that it needed no revision to accomplish Congress' purpose

in expanding the "cable service" definition in 1996. The original language and legislative history of the 1984 Cable Act did not freeze the scope of "cable service" and "other programming service" in a time capsule because, as the Supreme Court has recognized, statutory words can enlarge in scope in light of subsequent changes in law or technology to prevent them from becoming anachronistic.

That Congress understood that cable modem service is a "cable service" is underscored by the 1998 Internet Tax Freedom Act, which exempts cable franchise fees under 47 U.S.C. §542 from that Act's moratorium. If cable modem service were not a "cable service," of course, that exemption would be superfluous. In fact, the *only* way to read the pertinent language and legislative history of the 1984 Cable Act, the 1996 Act, and the 1998 Internet Tax Freedom Act together in a coherent, consistent way is to classify cable modem service as a "cable service."

As a "cable service," cable modem service is subject to the requirements of Title VI. The revenues that a cable operator derives from providing cable modem service are subject to cable franchise fees under 47 U.S.C. §542. Further, given that most cable operators currently pay franchise fees on cable modem service and cable modem service has enjoyed explosive growth, there can be no suggestion that franchise fees inhibit the growth of cable modem service. Excluding cable modem service revenues from franchise fees, on the other hand, would deprive local governments of million of dollars of needed revenue, directly contrary to Congress' intent in the 1996 Act.

Cable customer service requirements, facilities and equipment requirements, and privacy requirements can and should be applied to cable modem

service. Indeed, Title VI, which for the most part is less regulatory than Title II, represents an appropriate balance between, on the one hand, the desire to minimize regulation to promote investment and growth and, on the other hand, the need to provide subscribers with certain basic consumer protections that experience with cable modem service to date strongly indicates they need.

Cable modem service is not a "telecommunications service." "Telecommunications," unlike "telecommunications service" and "cable service," is not defined in terms of a service offered, but in terms of a functional capability. Consequently, the mere fact that "telecommunications" functionality is one of several component parts of a service offering does not mean that the service is a "telecommunications service." Indeed, even the most traditional cable services contain a "telecommunications" component, but are not thereby transformed into a "telecommunications service."

As with more traditional cable services, "telecommunications" functionality is but only of many functionalities that are bundled together to form cable modem service. Because a cable operator does not unbundle the "telecommunications" functionality from other components of cable modem service and offer it separately to the public -- either in its offering to end-use subscribers or to third-party ISPs -- a cable operator's provision of a cable modem service does not constitute a "telecommunications service." The *Portland* decision therefore was wrongly decided.

Cable modem service is an "information service" only to the extent that "cable service" is a species of "information service." Because the "cable service"

definition was expanded in 1996 to include "information services" and "enhanced services" offered to subscribers over a cable system, "cable service" and "information service" are not mutually exclusive terms. The *Gulf Power* court erred in concluding otherwise. It also erred in suggesting that cable modem service is not a "cable service."

2. Open Access Issues.

The "open access" question cannot be resolved in a vacuum. It hinges on the proper regulatory classification of a cable modem service. We believe that Congress has clearly classified cable modem service as a "cable service," which in turn means that it is governed by Title VI.

If, however, the Commission were to decide that cable modem service is a "telecommunications service" (wrongly, we believe), then cable modem service must be subject to the full open access requirements of Title II. Forbearance under Section 10 of the Communications Act would be inappropriate, because for at least the next few years, cable operators will enjoy considerable market power with respect to the provision high-speed Internet access to residential customers, evidence to date makes clear that Title II - type open access regulation is necessary to ensure that unaffiliated ISPs have reasonable and non-discriminatory access to the cable modem platform, and the record also demonstrates that regulation is indeed necessary to protect consumers.

3. The Proper Course for the Commission.

The Commission faces a fundamental choice in this proceeding: If, as we believe, cable modem service is a "cable service," the Commission may continue its current "hands-off" policy with respect to that service. If the Commission were instead to

conclude that cable modem service is a "telecommunications service," then the Commission's "hands-off" policy must be abandoned, and cable modem service must be subject to the full panoply of Title II requirements. Moreover, the Commission cannot avoid this choice by labeling cable modem service an "information service," because "cable service" includes information services provided to subscribers over a cable system.

We believe that the Act dictates the proper choice: Cable modem service is a "cable service." To eliminate the ambiguity and inconsistency spawned by *Portland* and *Gulf Power*, the Commission should promptly initiate and complete a rulemaking to classify cable modem service as a "cable service."

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COMMENTS OF THE NATIONAL LEAGUE OF CITIES, THE TEXAS COALITION OF CITIES FOR UTILITY ISSUES, THE CITY OF PALO ALTO, CALIFORNIA, AND THE CITY OF EUGENE, OREGON

The National League of Cities ("NLC"), the Texas Coalition of Cities for Utility Issues ("TCCFUI"), the City of Palo Alto, California, and the City of Eugene, Oregon (collectively, the "City Coalition" or "Coalition") submit these comments in response to the Notice of Inquiry ("*NOI*"), released September 28, 2000, in the above-captioned proceeding.

NLC is the nation's oldest and largest national organization representing the interests of municipalities, with a current membership of approximately 1,500 municipalities across the nation. In addition, NLC members include 49 state municipal associations which, in turn, represent an additional 18,000 municipalities within their respective states.

TCCFUI is a coalition of approximately 110 cities in Texas that have joined together to, among other things, advocate their interests in municipal franchising, municipal right-of-way management and compensation, municipal public utility

infrastructure, and other related issues before the FCC, the Texas PUC, the Texas legislature and other fora. The City of Palo Alto, in the heart of Silicon Valley, and the City of Eugene, the cultural, economic and educational center of the southern Willamette Valley, serve residents with strong interests in preserving municipal cable franchising authority and right-of-way management and compensation authority, and in making broadband Internet access widely and rapidly available.

All members of the City Coalition, and indeed, all local governments nationwide, share a deep interest in the issues raised by the *NOI*. The regulatory classification of cable modem services under the Communications Act -- whether it is a "cable service," a "telecommunications service," or an "information service" -- will have a dramatic effect on such vital matters as local governments' jurisdiction over cable modem services providers, local governments' franchise fee revenues, and the applicability of customer service standards to cable modem services. Similarly, the question of "open access" is an important one for local governments and the residents that they represent. City Coalition members' primary goal on this issue is that broadband Internet access service be made available to the widest possible number of their residents as rapidly as possible, and at competitive, reasonable rates. Because the *NOI* squarely raises each of these issues, the City Coalition files these comments.

INTRODUCTION

The City Coalition shares the Commission's *NOI* objectives of promoting the widespread and rapid deployment of high-speed services and of promoting a vibrant and

competitive free market for Internet services. *NOI* at ¶2. Achieving those objectives will greatly benefit both local governments and their residents, both of whom are, of course, consumers and potential consumers of Internet and other high-speed services.

Given the ambiguity and inconsistency in recent precedent,[1] we also applaud the FCC's objective of eliminating that ambiguity and establishing a consistent legal and policy framework for cable modem services and the cable modem platform. *NOI* at ¶2.

The City Coalition strongly believes that any legal and policy framework established with respect to cable modem services must be tied solidly to the language and structure of the Communications Act. It should not be based on a simplistic policy preference for uniform treatment of all broadband services providers, unhinged from the lines Congress drew in the Act.

We are therefore heartened by the *NOI*'s recognition that the Act accords different treatment to different kinds of providers and services and that, as a result, the Act may not permit, much less require, the Commission to apply the same Title of the Communications Act to the offerings of all providers of high-speed services. *See NOI* at ¶4. Indeed, as we show below, a careful examination of pertinent provisions of the Act

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[1] *Compare AT&T v. City of Portland*, 216 F. 3d 871 (9th Cir. 2000) (holding that cable modem service is both a "telecommunications service" and an "information service") *with Gulf Power Co. v. FCC*, 208 F. 3d 1263, *reh. denied*, 226 F. 3d 1220 (11th Cir. 2000), *cert. petit. filed*, No. 00-832 (U.S. filed Nov. 22, 2000) (holding that Internet service is an "information service" and not a "cable service" or a "telecommunications service") ("*Gulf Power*"), *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712 (E.D. Va. 2000), *appeal pending* No. 00-1680 (4th Cir. filed May 25, 2000) (concluding that cable modem service is a "cable service") ("*Henrico*"), *Comcast Cablevision of Broward County v. Broward County*, No. 99-6934-Civ (S.D. Fla. filed Nov. 8, 2000) (treating cable modem service like a cable service)

Continued on next page

and its legislative history points directly to the conclusion that cable modem service is a "cable service" within the meaning of 47 U.S.C. §522(6). This means, of course, that cable modem service is regulated differently, and subject to different requirements, than potentially competitive alternative services which clearly are not a "cable service," such as dial-up Internet access and DSL services offered by ILECs and CLECs, and wireless Internet access services that may be provided by satellite and terrestrial wireless providers. But those differences in regulatory treatment reflect dividing lines drawn by Congress, and that only Congress can change.

In these comments, the City Coalition focuses on what it considers to be the two primary issues raised by the NOI. In Part I, we address the regulatory classification of cable modem services. In Part II, we address the issue of "open access." In Part III, we suggest that the Commission should institute a rulemaking to clarify that cable modem service is a "cable service."

I. THE REGULATORY CLASSIFICATION OF CABLE MODEM SERVICES.

The *NOI* requests comment on the regulatory classification of cable modem services and/or the cable modem platform. *NOI* at ¶¶15-24. Specifically, the *NOI* asks whether cable modem services and/or the cable modem platform should be considered to be a "cable service" subject to Title VI, a "telecommunications service" subject to Title II, an "information service" subject to Title I, or perhaps even none of the above. *Id.*

Continued from next page
("*Broward*"), and *Internet Ventures*, 15 FCC Rcd 3247 (2000)(declining to decide whether cable-based Internet access is a "cable service") ("*Internet Ventures*").

The Commission wisely raises this fundamental question at the outset of the *NOI*. Resolution of this threshold classification issue is essential, since it will have dramatic consequences on how all of the other issues raised by the *NOI* can be resolved.

The City Coalition believes that when the Act, pertinent legislative history and other relevant statutes and decisions are carefully considered and placed in context, the proper resolution of this vital threshold issue becomes clear. As we show in Part I (A) below, cable modem services should properly be considered a "cable service" within the meaning of 47 U.S.C. §522(6). In Part I (B), we point out that this means that cable modem services are subject to cable franchise fees, customer service standards, and the other requirements of Title VI, and that this result is fully consistent with the Commission's stated objectives in the *NOI*. In part I (C), we explain why cable modem service is not a "telecommunications service" within the meaning of 47 U.S.C. §153 (46). Finally, in Part I (D), we demonstrate that cable modem service is an "information service" within the meaning of 47 U.S.C. §153 (20) only if "cable service" is viewed to be a species of "information service."

A. Cable Modem Service Is A "Cable Service."

The *NOI* (at ¶ 16) invites comments on whether cable modem service is a "cable service" within the meaning of 47 U.S.C. § 522(6). The City Coalition strongly believes that it is.[2]

[2] We recognize that the *Portland* and *Gulf Power* decisions held otherwise, but as we point out in Parts I (C) and I (D) below, those decisions rested on an incomplete, and therefore erroneous, analysis of the relevant statutes and legislative history.

The place to begin, of course, is with the statutory language. "Cable service" is defined as:

> "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and
>
> (B) subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service."

47 U.S.C. § 522(6) (emphasis added).

As the *NOI* points out (at ¶16), the phrase "or use" was added by the Telecommunications Act of 1996. The legislative history of this 1996 amendment leaves no doubt that Congress intended the revised definition to encompass services like cable modem service. The Conference Report explains the purpose of adding the phrase "or use" as follows:

> "The conferees intend the amendment [adding "or use" to the "cable service" definition] to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services."[3]

Representative John Dingell amplified this point in his remarks during the floor debate on final passage of the bill that became the 1996 Act:

> "Mr. Speaker, I want to say a few special words about the concerns of our local elected officials, and most especially our mayors. This conference agreement strengthens the ability of local governments to collect fees for the use of

[3] H.R. Confer. Rep. No. 458, 104th Cong., 2d Sess. at 169 (Jan. 31, 1996) ("*1996 Conf. Report*"). *See also* H.R. Rep. No. 204, Part 1, 104th Cong., 1st Sess. at 106-107 (July 24, 1995) ("*1995 House Report*") ("Subsection (a) amends the definition of 'cable service' in Section 602(6) of the Communications Act by adding 'or use' to the definition, reflecting the evolution of video programming toward interactive services").